July 9, 2007

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member, Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Edward M. Kennedy
United States Senate
Washington, DC 20510

The Honorable Orrin G. Hatch
United States Senate
Washington, DC 20510

The Honorable Joseph R. Biden, Jr.
United States Senate
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The Honorable Charles E. Grassley
United States Senate
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The Honorable Herb Kohl
United States Senate
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The Honorable Jon Kyl
United States Senate
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The Honorable Diane Feinstein
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The Honorable Jeff Sessions
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The Honorable Russell D. Feingold
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The Honorable Lindsey Graham
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The Honorable Charles E. Schumer
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The Honorable John Cornyn
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The Honorable Richard J. Durbin
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The Honorable Sam Brownback
United States Senate
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The Honorable Benjamin L. Cardin
United States Senate
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The Honorable Tom Coburn
United States Senate
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The Honorable Sheldon Whitehouse
United States Senate
Washington, DC 20510

Dear Senators:

In its Statement of Administration Policy ("SAP") on H.R. 1592, The Local Law Enforcement Hate Crimes Prevention Act of 2007, the Administration raises constitutional concerns challenging the authority of Congress to enact one subsection of the proposed legislation. We write to express our view that this provision is clearly within the power that the Constitution grants to Congress. Moreover, we believe that the proposal comports with the Constitution's structural precepts, including the principles of federalism that allocate power between the national government and the states.

The SAP questions only the validity of the provision that proposes to add a new § 249(a) to title 18 of the United States Code. Section 249(a) would prohibit violent crimes motivated by the race, color, religion, or national origin of the victim. In contrast to § 249(a), § 249(b) would prohibit violent crimes motivated by religion, national origin, gender, sexual orientation, gender identity or disability, but only if the crime were committed with some connection to interstate commerce, such as during interstate travel or in a way that affects interstate commerce. Section 249(b) is thus limited to circumstances clearly falling within Congress's power to regulate interstate commerce.[1] U.S. Const. art. I, sec. 8, cl. 3. While the SAP does not challenge the validity of § 249(b), we are aware of some public commentary that questions the validity of extending federal statutory protection to gay, lesbian, bisexual and transgendered persons. These attacks are not well-founded. Section 249(b) extends protection only in instances that are within the recognized categories of congressional power under the Commerce Clause. Because § 249(a) is not similarly limited to effects on interstate commerce, its text, standing alone, does not expressly invoke one of Congress's enumerated powers. The Administration's constitutional concern apparently stems from the unqualified nature of §249(a).

It is axiomatic that Congress's power, and that of the federal government as a whole, is limited and enumerated. *See, e.g.*, M'Culloch v. Maryland, 17 U.S. 316 (1819); Gibbons v. Ogden, 22 U.S. 1 (1824); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Boerne v. Flores, 521 U.S. 507 (1997). In the case of § 249(a), the Thirteenth Amendment authorizes Congress to enact the provision. When the Justice Department commented on a similar version of this provision, it agreed with this conclusion. *See* Letter for Senator Edward M. Kennedy, from Robert Raben, Assistant Attorney General, Office of Legislative Affairs (June 13, 2000), reprinted in Report of

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[1] The SAP does not challenge the constitutionality of this subsection. Because § 249(b) contains several alternative jurisdictional elements, its coverage can readily be understood to be coterminous with Congress's power under the Commerce Clause.

The SAP raises the objection that the subsection protects against hate crimes motivated by certain types of animus (based on gender, sexual orientation, religion, and disability) but not by other forms of discriminatory violence that might be considered equally worthy of statutory attention. This is at most a policy objection, not a constitutional objection, especially in light of the comparable or greater statutory protections extended in Section 249(b) with respect to hate crimes motivated by animus based on race, color, religion or national origin. Congress has enacted, and the Supreme Court has affirmed, numerous statutes protecting veterans, the elderly, and pregnant women in various ways. In enacting §249(a), Congress stands on the same firm footing as it did when enacting these other statutes, reflecting the basic principle that when it legislates, Congress need not address every conceivable societal ill.

the Committee on the Judiciary, United States Senate, on The Local Law Enforcement Enhancement Act of 2001, at 16-18 (107th Cong., 2d. sess.)("DOJ Letter").

The Thirteenth Amendment provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation." In contrast to those provisions of the Fourteenth Amendment directed at "state action," this constitutional provision was designed to reach private conduct. The Amendment sets forth an essential postulate of liberty: no person should exercise that kind of degrading control and domination over another person that was characteristic of slavery or involuntary servitude, including the use of physical violence.[2] The Supreme Court has explained that the Thirteenth Amendment grants Congress a broad power to effectuate this postulate. In doing so, Congress has authority to go well beyond merely prohibiting slavery; it may also eliminate the "incidents" of slavery. Moreover, the Court substantially defers to Congress's judgments in this area. "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

Based on this understanding of congressional power under the Thirteenth Amendment, the Supreme Court has upheld a variety of protections that go well beyond a specific prohibition of slavery. For example, the Court relied on the Thirteenth Amendment to uphold a federal law that prohibits a private owner of real property from engaging in racial discrimination in the sale or rental of the property. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)(upholding 42 U.S.C. § 1982). The Court extended that reasoning to uphold a federal law forbidding racial discrimination in the making of private employment contracts and providing a federal cause of action to enforce the prohibition. *See* Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (upholding 42 U.S.C. § 1981). The Court also held that the Thirteenth Amendment authorizes Congress to prohibit private schools from making racially discriminatory admissions decisions. *See* Runyon v. McCrary, 427 U.S. 160 (1976).[3] The Court has further held that the Thirteenth Amendment vests Congress with broad criminal law authority. As the Court explained in Griffin v. Breckenridge, 403 U.S. 88, 105 (1971), "the varieties of private conduct that [Congress] may make criminally punishable or civilly remediable [under the Thirteenth Amendment] extend far beyond the actual imposition of slavery or involuntary servitude." In that case, the Court upheld a federal criminal conviction for an assault against a group of African-Americans whom the assailants believed had traveled to Mississippi to participate in civil rights advocacy.

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[2] *See, e.g.*, Akhil Reed Amar, *Remember the Thirteenth*, 10 Const. Comm. 403, 405 (1993)("slavery is a system of domination, degradation and subordination ....").

[3] The Supreme Court limited, on grounds of statutory construction, the scope of *Runyon* in Patterson v. MacLean Credit Union, 491 U.S. 164 (1989). Congress responded to *Patterson* by expanding the scope of the underlying legislation in the Civil Rights Act of 1991.

The lower federal courts have followed and applied this line of cases in numerous decisions. One recent case bears particular attention. In United States v. Nelson, 277 F.3d 164 (2d Cir. 2002), the Second Circuit upheld Congress's authority to make it a federal crime to engage in a racially motivated assault when the victim was participating in or enjoying a facility provided or administered by a state. In upholding the law's validity and application in that case, the court emphasized that the federal law did not seek to "create a general, undifferentiated federal law of criminal assault." *Id.* at 185.

Congress has clear authority to enact the Local Law Enforcement Hate Crimes Prevention Act of 2007 under these precedents. To be sure, this legislation would extend the existing federal statutory proscription of hate crimes to forbid all crimes of violence motivated by animus toward one of the classes set forth in section 249(a), and thereby eliminate the existing prohibition's requirement that the violence have been designed to prevent the victim from utilizing a state facility or exercising a state right. The bill, as introduced in the House of Representatives, sets forth the basis of Congress's authority. As the bill's findings explain, "For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude." H.R. 1592, § 2(7), as reported March 20, 2007. Consistent with that view, Judge Guido Calabresi observed in *Nelson*, the "practice of race-based private violence both continued beyond the demise of the institution of chattel slavery and was closely connected to the prevention of former slaves' exercise of their newly obtained civil and other rights (rights that slavery had previously denied them), thereby presenting 'a spectacle of slavery unwilling to die.'" *Id.* at 190 (quoting *Jones*, 392 U.S. at 445 (Douglas, J., concurring)). The legislation, moreover, would not create a general, undifferentiated federal law of criminal assault. Rather, it would apply only to the sort of violence that Congress could reasonably determine remains an incident and relic of slavery: racially motivated violence.[4]

Section 249(a) would also apply to crimes of violence motivated by religion or national origin. In light of the findings proposed by § 2(8) of the bill as reported in the House of Representatives, *see* H.R. 1592 (March 20, 2007), we understand those categories to refer to only those religions or national origins that would have been understood as races at the time the Thirteenth Amendment was enacted. That § 249(b) – with its jurisdictional commerce element – also refers to crimes motivated by religion or national origin supports the view that § 249(a) should be construed to apply to only a subset of religions and national origins. In interpreting the scope of the Thirteenth Amendment, the Supreme Court has held that it authorizes congressional legislation

[4] This includes even discriminatory violence against races that were not themselves the direct victims of slavery. The Supreme Court has ruled that Thirteenth Amendment and congressional power under it extend to protecting "'every race and individual.'" *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 288 n.18 (1976) (quoting *Hodges* v. *United States*, 203 U.S. 1, 16-17 (1906)).

protecting persons of religions and national origins understood to be races when the Thirteenth Amendment was adopted. *See Saint Francis College* v. *Al-Khazraii,* 481 U.S. 604, 613 (1987)(finding congressional authority to protect Arabs); *Shaare Tefila Congregation* v. *Cobb,* 481 U.S. 615, 617-18 (1987)(authority to protect Jews).

Oddly, the SAP never discusses the Thirteenth Amendment at all, limiting its analysis of potential sources of congressional authority for H.R. 1592 to the power to protect federal personnel, to regulate interstate commerce, and to enforce equal protection of the laws. Given the Justice Department's public position that the Thirteenth Amendment authorized a prior version of the proposed legislation, the SAP's omission is particularly surprising.

This legislation, wholly within Congress' authority under the Thirteenth Amendment, is also quite sensitive to the legitimate interests of the states within the constitutional structure of federalism. While the Court has indicated in recent cases that legislation providing federal remedies for private conduct can raise serious federalism concerns, H.R. 1592 has been drafted to avoid these concerns. Far from supplanting state authority, the proposed legislation defers to the proper role of the states. Federal authorities would be authorized to prosecute cases only after the Attorney General (or a Senate confirmed officer at the grade of Assistant Attorney General or higher) has certified in writing that the officer "has consulted with State or local law enforcement officials regarding the prosecution and determined that (A) the State does not have jurisdiction or does not intend to exercise jurisdiction; (B) the State has requested that the Federal Government assume jurisdiction; (C) the State does not object to the Federal Government assuming jurisdiction; or (D) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence." H.R. 1592 would thus create a federal authority that is only interstitial; it would allow federal authorities to fill in the gaps only where a state's law does not adequately address the situation or where the state prefers to let the federal authorities handle the matter. By design, then, H.R. 1592 would respect the primary role of the states in the administration and enforcement of criminal law, merely adding a backstop in this area of particular federal concern.

In recent years, in cases involving the Fourteenth Amendment, the Supreme Court has taken a seemingly less expansive view of congressional authority to prevent and remedy violations of civil rights by the states. In crucial respects, these recent rulings provide additional support for our conclusion and, in any event, do nothing to undermine it. First, the leading recent case on congressional power under the Fourteenth Amendment, Morrison v. United States, 529 U.S. 598 (2000), underscores a central distinction between congressional power under the Thirteenth and Fourteenth Amendments. Whereas the Fourteenth Amendment prohibits states from violating individual civil rights, the Thirteenth Amendment extends to private conduct. Thus, the state action limitation, which the *Morrison* Court emphasized as a vital limit on congressional power to enforce the Fourteenth Amendment, simply has no application to the Thirteenth Amendment. *Id.* at 620-627.

Morrison and subsequent cases recognize that, when Congress enforces one of the rights granted by the Fourteenth Amendment as against the states, it may go beyond simply redressing actual violations of those rights. It may also enact prophylactic measures to safeguard against violations of specific constitutional prohibitions. In delineating the limits of that prophylactic authority, the Supreme Court has held that the legislation must be proportional and congruent to the unconstitutional conduct sought to be prevented. *See* Boerne v. Flores, 521 U.S. 507 (1997).[5] The Court viewed the purpose of this requirement as being to protect the proper role of the states in our federal system. If congressional power to enforce the Fourteenth Amendment were read too broadly, it would risk authorizing the federal government to intrude into spheres that the Constitution is understood to have reserved to the states. Moreover, H.R. 1592 respects these principles of federalism, as described above, by preserving the primary role of the states in defining and enforcing criminal prohibitions.

Of course, the recent line of Fourteenth Amendment decisions is not directly pertinent to H.R. 1592, because the leading precedents under the Thirteenth Amendment, such as *Jones* and *Griffin*, remain the governing law and give Congress greater leeway than it might have with respect to enforcement of the Fourteenth Amendment.[6] But even if the Court were one day to hold that the congruence and proportionality requirements extend to the Thirteenth Amendment (and that H.R. 1592 were understood as prophylactic), the carefully circumscribed authority for federal criminal prosecutions provided in the legislation plainly meets those standards.

While we take no position on the merits of the proposed legislation as a matter of policy, we believe that these provisions of H.R. 1592 fall well within Congress's constitutional authority. Moreover, we believe that the proposed legislation as drafted is fully consistent with the constitutional principles of federalism.

Sincerely,

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[5] We do not mean to suggest that we agree that *Boerne v. Flores* is correctly decided as a matter of constitutional interpretation, a matter that is the subject of academic controversy *See, e.g.,* Robert Post & Reva Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 Yale L.J. 441 (2000).

[6] *See* DOJ Letter at 19-21; *see also Nelson*, 277 F.3d at 185 n.20.

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January 17, 2007

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The Honorable Mitch McConnell
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The Honorable Nancy Pelosi
Speaker
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The Honorable John Boehner
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The Honorable Patrick Leahy
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The Honorable John Conyers
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The Honorable Lamar Smith
Ranking Member, Committee on the Judiciary
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Dear Congressional Leaders:

Since President Bush announced his intention to increase the number of troops deployed in Iraq, Americans have been debating the wisdom of his plan. Some have questioned whether Congress possesses the constitutional authority to affect that plan's implementation. Vital, therefore, to the public debate and to congressional deliberations is a clear understanding of the authority that the Constitution vests in Congress. We write as constitutional scholars to express our view that this authority is more than ample for Congress to give legal effect to its will with respect to the troop increase.

The Constitution's text is quite plain with respect to one mechanism by which Congress might give legal effect to whatever judgment it makes: Congress's spending powers. Congress clearly may cut off funds entirely and bring an armed conflict to an end. It may also take the intermediate step of providing that the President may not use military appropriations to alter the scope or nature of the conflict that Congress has authorized and funded, such as by prohibiting the President from using appropriated funds to increase troop levels or to broaden a conflict into additional nations or territories.

A question of current debate is whether Congress's spending powers provide the only check that Congress holds in the context of ongoing military hostilities. The Constitution confers on Congress the power to declare war, but it also makes the President the Commander in Chief. As Commander in Chief, the President possesses certain interstitial or inherent powers to act in the absence of congressional legislation – for example, to defend the nation even when Congress has not specifically provided

authority. But as Justice Jackson famously emphasized in *Youngstown Sheet & Tube Co. v. Sawyer* (the Steel Seizure case), presidential power to act in the absence of congressional action must not be equated with presidential power to ignore statutory restrictions enacted pursuant to Congress's constitutional authorities.[1]

The Constitution expressly grants Congress extensive powers relating to war, beyond the well-known appropriations power and the power to declare war. Specifically, the Constitution authorizes Congress to:

- Lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States;[2]
- Define and punish piracies and felonies committed on the high seas and offenses against the law of nations;[3]
- Declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;[4]
- Raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;[5]
- Provide and maintain a navy;[6]
- Make rules for the government and regulation of the land and naval forces;[7]
- Provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;[8]
- Provide for organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress;[9]
- Make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.[10]

These provisions plainly set forth an extensive role for Congress that goes far beyond the initial decision to declare war and subsequent decisions regarding its funding. This mass of war powers confers on Congress an ongoing regulatory authority with respect to the war. Indeed, these powers are so extensive that Chief Justice John Marshall opined (with some exaggeration, when read out of context) that "[t]he whole powers of war [are], by the Constitution of the United States, vested in Congress ...."[11]

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[1] 343 U.S. 579 (1952).
[2] U.S. Const. art. I, sec. 8, cl. 1.
[3] *Id.* cl. 10.
[4] *Id.* cl. 11.
[5] *Id.* cl. 12.
[6] *Id.* cl. 13.
[7] *Id.* cl. 14.
[8] *Id.* cl. 15.
[9] *Id.* cl. 16.
[10] *Id.* cl. 18.
[11] Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801).

As Commander in Chief, the President's role is to prosecute the war that Congress has authorized within the legitimate parameters Congress sets forth. Congress has exercised precisely this power to define the parameters of armed conflict or war on a number of occasions, some of which concern recent military engagements.[12]

This understanding of Congress's role has also been the consistent interpretation of the courts. Early in our country's history, the Supreme Court set forth this interpretation in a series of cases arising from the naval war with France. The statutory basis for this conflict was a set of authorizations to use force against French maritime interests. These statutes empowered the President to use military force to take specific, limited sorts of actions against French vessels; they identified the places where force could be exercised and the purposes for which force should be employed.

In *Bas v. Tingy*, Justice Samuel Chase explained that these statutes "authori[z]ed hostilities on the high seas by certain persons in certain cases," but did not give the President the authority "to commit hostilities on land; to capture unarmed French vessels, nor even to capture French armed vessels lying in a French port."[13] This meant that Congress had authorized a limited war against France — a war, in the words of Justice Bushrod Washington, "confined in its nature and extent; being limited as to places, persons, and things."[14] In such a war, those "who are authorised to commit hostilities . . . can go no farther than to the extent of their commission."[15]

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[12] Some examples include U.S. Public Law No. 93-559, sec. 38(F)(1)-(2), The Foreign Assistance Act of 1974(imposing a personnel ceiling of 4000 Americans in Vietnam within six months of enactment and 3000 Americans within one year); U.S. Public Law No. 98-43, sec. 4(a), The Lebanon Emergency Assistance Act of 1983(mandating that the President to return to seek statutory authorization as a condition for expanding the size of the U.S. contingent of the Multinational Force in Lebanon); U.S. Public Law No. 91-652, The Supplemental Foreign Assistance Act of 1971, sec. 8 (prohibiting the use of any funds for the introduction of U.S. troops to Cambodia or provision of military advisors to Cambodian forces without the prior notification of the congressional leadership). Additional examples involve the use of the spending power: U.S. Public Law No. 93-50, sec. 307, The Second Supplemental Appropriations Act, 1973 ("None of the funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other act may be expended for such purposes."); U.S. Public Law No. 98-215, sec. 108, The Intelligence Authorization Act for Fiscal Year 1984 (Boland Amendment, prohibiting certain covert military assistance in Nicaragua); U.S. Public Law No. 103-139, sec. 8151(b)(2)(B), The Department of Defense Appropriations Act, 1994 (limiting the use of funding in Somalia for operations of U.S. military personnel only until March 31, 1994, and permitting expenditure of funds for the mission thereafter only if the president sought and Congress provided specific authorization); U.S. Public Law No. 105-85, sec. 1203, The National Defense Authorization Act for Fiscal Year 1998 (prohibiting funding for Bosnia "after June 30, 1998, unless the President, not later than May 15, 1998, and after consultation with the bipartisan leadership of the two Houses of Congress, transmits to Congress a certification— (1) that the continued presence of United States ground combat forces, after June 30, 1998, in the Republic of Bosnia and Herzegovina is required in order to meet the national security interests of the United States; and (2) that after June 30, 1998, it will remain United States policy that United States ground forces will not serve as, or be used as, civil police in the Republic of Bosnia and Herzegovina.").

[13] 4 U.S. (4 Dall.) at 43 (opinion of Chase, J.).

[14] *Id.* at 40 (opinion of Washington, J.).

[15] *Id.*

In *Little v. Barreme*,[16] Chief Justice Marshall held that the President's war powers were subject to valid statutory limitation. This case considered the statute whereby Congress had authorized the U.S. Navy to intercept vessels bound to French ports, but did not authorize the President to intercept ships bound from such ports. In *Little* a U.S. Navy ship, acting pursuant to a presidential order to intercept ships bound to or from French ports, intercepted a commercial vessel suspected of coming *from* a French port. The Supreme Court ruled the action illegal because it went beyond the military force authorized by statute.

The Supreme Court has continued to adhere to this view of the war power. In modern times, the Court has consistently held that the President is bound by statutory restrictions in wartime. In *Youngstown Sheet & Tube*, the Court struck down President Truman's order that the nation's steel mills continue operating in order to keep United States troops in the Korean War armed. Justice Jackson's famous concurring opinion — which the Court has since acknowledged "brings together as much combination of analysis and common sense as there is in this area"[17] — emphasized that the Constitution did not set forth an exclusive power in the Commander in Chief that would permit him to disregard Congress's statutory restrictions on his preferred means of conducting the war.

Most recently, the Supreme Court has applied Justice Jackson's framework to resolve challenges to President Bush's assertions of Commander-in-Chief power. In a number of recent Supreme Court cases, particularly *Rasul v. Bush*,[18] *Hamdi v. Rumsfeld*,[19] and *Hamdan v. Rumsfeld*,[20] the Bush Administration has asserted broad unilateral authority to conduct military operations (in those cases dealing specifically with the detention and treatment of enemy combatants). In none of these cases did the Supreme Court vindicate the Bush Administration's position. Indeed, in each case, the Court required the President to comply with applicable statutory limits.

We recognize the dictum first enunciated by Chief Justice Salmon P. Chase in his concurring opinion in *Ex Parte Milligan*: "The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns ...."[21] This dictum is sometimes taken to mean that Congress may not enact laws designed to dictate tactical or command decisions. As the point is sometimes put, Congress may not micromanage the President's execution of a war.[22]

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[16] 6 U.S. (2 Cranch) 170 (1804).
[17] *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981).
[18] 542 U.S. 466 (2004).
[19] 542 U.S. 507 (2004).
[20] 126 S. Ct. 2749 (2006).
[21] 4 U.S. (4 Wall.) at 139-140 (Chase, C.J. concurring in the judgment); s*ee also Hamdan*, 126 S. Ct. at 2773-2774 (2006); *accord* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645-46 (1952)(Jackson, J., concurring).
[22] Some of us have significant doubts about the accuracy of this claim.

Wherever one comes down on the outer limits of legislative war powers, *Little v. Barreme* and *Bas v. Tingy* make clear that Congress retains substantial power to define the scope and nature of a military conflict that it has authorized, even where these definitions may limit the operations of troops on the ground. The proposed statutory restrictions relating to the war in Iraq that are the subject of this letter fall well within this long recognized authority.[23]

Thus, Congress may limit the scope of the present Iraq War by either of two mechanisms. First, it may directly define limits on the scope of that war, such as by imposing geographic restrictions or a ceiling on the number of troops assigned to that conflict. Second, it may achieve the same objective by enacting appropriations restrictions that limit the use of appropriated funds. Indeed, the reason that the Constitution explicitly limits appropriations for the Army to two years is in order to ensure that Congress oversees ongoing military engagements.

The Constitution's drafters understood the immense national sacrifice that war entails. Moreover, they understood that during times of war presidential power tends to expand. For these reasons, the Constitution assigns Congress the power to initiate war and to fund and define the parameters of military operations. As James Madison wrote, "the constitution supposes what the History of all Gov[ernments] demonstrates, that the Ex[ecutive] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl[ative branch]."[24] The Constitution's structure, then, clearly contemplates that important decisions regarding the scale of war will not necessarily be made by the President alone, but ideally should, and certainly can, be reached through the democratic process with all the deliberation that entails. Far from an invasion of presidential power, it would be an abdication of its own constitutional role if Congress were to fail to inquire, debate, and legislate, as it sees fit, regarding the best way forward in Iraq.

Sincerely,

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[23] Some commentators have extended the micromanagement objection to limit Congress's authority to use its spending powers. Their claim is that Congress may not utilize the spending power to impose unconstitutional conditions on the President. This is certainly true – Congress may not deploy its spending power to achieve unconstitutional ends. But this tells us nothing about what conditions are or are not constitutional. As with direct regulation of the nature and scope of war or other hostilities, it is not unconstitutional for Congress to deploy its spending powers to regulate the nature and scope of a conflict in ways that also have real consequences for how the war is conducted.

[24] Letter to Thomas Jefferson (April 2, 1798), in 6 Writings of James Madison 312 (Gaillard Hunt, ed. (1900-1910).

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Testimony of Dawn E. Johnsen
Before the U.S. Senate Committee on the Judiciary Subcommittee on the Constitution
"Secret Law and the Threat to Democratic and Accountable Government"
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I was privileged to have the opportunity to serve for five years at the Office of Legal Counsel, first as a Deputy Assistant Attorney General (1993-1997) and then as the Acting Assistant Attorney General heading that office (1997-1998). Since then, I have continued to study the work of OLC (as it is known) as a professor of law at Indiana University—Bloomington, where for the past ten years I have focused my work on issues of constitutional law and especially presidential power.

Excessive executive branch secrecy undoubtedly threatens the proper functioning of our constitutional democracy. The reasons are simply stated. Openness in government is critical to our system of checks and balances: Congress and the courts cannot possibly safeguard against executive branch overreaching or abuses if they (and potential litigants) do not know what the executive branch is doing. Openness is critical to democratic accountability and self-governance: without it, we the people cannot intelligently vote and petition the government for change. Openness is critical to our nation's standing in the world community as a model worthy of emulation.

There has been consistent criticism of the Bush Administration's penchant for secrecy as a general matter, but this hearing more narrowly focuses on one particularly harmful aspect of the government's current excessive secrecy: its practice of making and relying on "secret law." I will focus my testimony on OLC's central role in that process.[1] OLC, most notably, was a key player in the development of the Bush Administration's most important counterterrorism issues. OLC has been widely and deservedly criticized for the substance of its legal interpretations, which at least at times have not reflected principled, accurate assessments of applicable legal constraints, but instead were tainted by the Administration's desired policy ends and overriding objective of expanding presidential power.

In addition, OLC has been terribly wrong to withhold the content of much of its advice from Congress and the public—particularly when advising the executive branch that in essence it could act contrary to federal statutory constraints. For example, recall that it is only because of government leaks that the public first learned—years late—of the Bush Administration's legal opinions and policies on extreme methods of interrogation (which concluded that the President need not comply with prohibitions on torture),[2] the government's domestic surveillance program (which operated outside the requirements of the Foreign Intelligence Surveillance Act),[3] and the use of secret prisons overseas to detain and interrogate (even waterboard) suspected terrorists.[4] The Bush

1. This testimony draws upon an analysis of the role of OLC and the Bush administration's use of extreme interrogation methods, in Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007).
2. *See* Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004, at A1.
3. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.
4. *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

Administration continues to keep secret, without adequate justification, some important advice on these and other issues, even as Congress continues to struggle to legislate in a vacuum. Last month's release of a five-year-old OLC opinion on permissible interrogation methods by the military reconfirmed the unjustified dangers of such extreme secrecy. That opinion, like many others, relied upon an extreme and clearly incorrect view of expansive presidential authority, and a correspondingly unduly narrow view of congressional power, that could not withstand the light of public scrutiny.

There are circumstances, of course, in which the executive branch should keep OLC advice secret. In extreme cases, the release of an OLC opinion could gravely imperil national security. Congress should respect the President's genuine needs for secrecy. But so, too, should the President respect Congress's need to know how—even whether—the executive branch is enforcing existing law. It is fundamental that if OLC advises the executive branch that it may disregard an applicable legal restriction—whether in the Constitution, a treaty or a statute—because a presidential prerogative trumps the law, OLC virtually always should make that legal interpretation public. There may be a need to redact factual details from the opinion about the program under review, if for example revealing them would create a genuine threat to national security. In rare circumstances, there may be a need for some delay in release of the opinion. But OLC should as soon as possible provide Congress and the public with the legal conclusions and reasoning behind any advice that the executive branch may disregard or in effect interpret away an existing legal requirement.

Before evaluating more closely these principles and the Bush Administration's deviation from them, it is useful to consider more generally OLC's role in the executive branch and the practical import of OLC's legal interpretations. OLC's essential function is to provide the President and other executive branch officials with the legal advice they need to ensure that their actions comply with the law. The Constitution obligates presidents to "preserve, protect and defend the Constitution"[5] and "take Care that the Laws be faithfully executed"[6] by those who work for them enforcing the law. In order to fulfill these obligations, the President clearly requires a source of legal advice. In recent decades, OLC ultimately has filled that role, working under delegated authority of the Attorney General. OLC functions as a kind of general counsel to other top lawyers in the executive branch, including the Counsel to the President, who tend to send OLC particularly difficult and consequential questions about what the relevant law requires with regard to contemplated governmental action.

By virtue of regulation and tradition, OLC's legal interpretations typically are considered binding within the executive branch unless overruled by the Attorney General or the President (which in practice rarely happens). Unless overruled, OLC's advice ordinarily must be followed by the entire executive branch, from the Counsel to the President and cabinet officers to the military and career administrators, regardless of any disagreement or displeasure with that advice. The flipside of having to comply with OLC interpretations is that executive officers and other governmental actors receive

5. U.S. CONST. art. II, § 1, cl. 8.
6. *Id.* art. II, § 3.

substantial protection from OLC opinions. It is exceedingly difficult to prosecute for illegal action someone who has relied on an OLC opinion, even if the President, the Attorney General, or OLC itself were subsequently to withdraw the opinion as conveying an incorrect view of the law. Any prosecution would have to satisfy the constitutional guarantee of due process, which would include the right of reasonable reliance on the government's authoritative legal interpretation. Moreover, as a practical matter, due to the substantial obstacles to judicial review especially on matters of national security, OLC interpretations at times prove final or may go unreviewed for years. OLC therefore plays a critical role in upholding the rule of law and our system of government.

OLC's legal interpretations regarding the interrogation of detainees provide a useful lens for evaluating the harms of secret OLC law. As is now widely known, beginning shortly after September 11, 2001, OLC issued a series of legal opinions and other secret legal advice that found lawful extreme methods of interrogation, including waterboarding, that are widely viewed as unlawful—and the Bush Administration actually relied on this advice to subject detainees to such methods. Some of these OLC opinions, and particularly one dated August 1, 2002 and leaked in the summer of 2004,[7] have been almost universally ridiculed and condemned as ends-driven, faulty legal analyses. For example, former Assistant Attorney General Jack Goldsmith has described his shock upon learning, when he assumed leadership of OLC in 2003, that this and some other key Bush-era OLC opinions "were deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President. I was astonished, and immensely worried, to discover that some of our most important counterterrorism policies rested on severely damaged legal foundations."[8] The Bush Administration itself withdrew this particular Torture Opinion under the pressure of public scrutiny, and ultimately issued a new opinion, but the details of its disagreement and its current views remain unclear to this day.

I was part of a group of nineteen former OLC lawyers who were outraged by that initial OLC Torture opinion that was leaked in the summer of 2004, and who responded by coauthoring a short statement of the core principles that we believe should guide OLC's formulation of legal advice. Our statement of ten principles, issued in December 2004 and entitled *Principles to Guide the Office of Legal Counsel* ("the Guidelines") describes how OLC should function, with an eye toward avoiding a recurrence of what to us was a dramatic and dangerous deviation from the office's longstanding, best traditions. The Guidelines draw upon "the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations."[9] I have appended that document, with its list of authors, to the end of this testimony for the record.

Among the ten principles is a call for OLC to "publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure." The Guidelines describe several values served by a presumption of public disclosure, beyond the general public accountability that accompanies openness in government. The

7. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002).
8. Jack Goldsmith, THE TERROR PRESIDENCY 10 (2007).
9. All quotations from the Guidelines are taken from the document appended to the end of this testimony.

likelihood of public disclosure will encourage both the reality and the appearance of governmental adherence to the rule of law, including by deterring "excessive claims of executive authority." In significant part because of inappropriate secrecy, the current Administration has dangerously compromised the work of OLC. Particularly on important counterterrorism matters, OLC has failed to satisfy the Guidelines' first and most fundamental principle:

> OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.

In short, OLC must be prepared to say no to the President. For OLC instead to distort its legal analysis to support preferred policy outcomes undermines the rule of law and our democratic system of government.

Perhaps most essential to avoiding a culture in which OLC becomes merely an advocate of the Administration's policy preferences is transparency in the specific legal interpretations that inform executive action, as well as in the general governing processes and standards followed in formulating that legal advice. The Guidelines note additional values, including that transparency "promotes confidence in the lawfulness of governmental action" and "adds an important voice to the development of constitutional meaning" which is particularly of value "on legal issues regarding which the executive branch possesses relevant expertise."

OLC at times undoubtedly possesses strong, even compelling, reasons for keeping some advice confidential, as the Guidelines acknowledge. The classic example is to protect national security interests, such as where the release of an OLC opinion might reveal the identity of a covert agent. Less obvious perhaps, OLC also often has a strong interest in not releasing opinions in which it advises the administration that a contemplated action would be unlawful and the administration accepts the advice and does not take the action. "For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formulation." Policymakers should not have to fear public disclosure of their hastily conceived ideas for potentially unlawful action—that is, and this is critical, so long as they abide by OLC's advice. The public interest is served when government officials run proposals by OLC, and publication policy must not unduly deter the seeking of legal advice. Thus, the Guidelines state, "[o]rdinarily, OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action."

A hypothetical helps illustrate: Imagine that in the immediate wake of the Oklahoma City bombing, the counsel to the President had asked OLC to consider several necessarily rough and hurriedly prepared proposals, among them whether the government could torture and unilaterally wiretap the leaders of right-wing militias suspected of

planning future attacks, notwithstanding federal statutes apparently to the contrary. If OLC advised that the proposed actions would be unlawful and the White House then decided not to pursue the policies, there would be relatively little need to disclose the request or the response and good reason to keep them confidential. If, however, OLC interpreted the relevant law to allow the torture and warrantless wiretapping, the public ordinarily would have a strong interest in seeing those opinions in an appropriate, timely manner.

The need for public disclosure is particularly strong whenever the executive branch does not fully comply with a federal statutory requirement. The Guidelines do not take a position on the circumstances under which it may be legitimate for a President not to enforce a statutory provision he concludes is unconstitutional—a complex and difficult question. The Guidelines do note its "rare" occurrence and call at a "bare minimum" for full public disclosure and explanation: "Absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation." The supporting legal analysis "should fully address applicable Supreme Court precedent." Indeed, Congress has required the Attorney General to notify Congress if the Department of Justice determines either that it will not enforce a statutory provision on the grounds the provision is unconstitutional or that it will not defend a statute against constitutional challenge.

The Bush Administration has not complied with this public notice standard and has operated in extraordinary secrecy, generally and with regard to its interrogation policy. Again, the Administration kept secret OLC's determination that the President had the constitutional authority to violate a federal statutory ban on torture, in an opinion that did not evaluate Congress's competing constitutional authorities or the most relevant Supreme Court precedent. The public learned of this determination only through a leak almost two years after OLC issued its written opinion and after the Administration began engaging in unlawful interrogations.

Rather than acknowledge it is asserting the authority to act contrary to a federal statute, the Bush Administration often claims it is simply "interpreting" the statutory provision—sometimes inconsistent with the best reading of the text and legislative intent—to avoid a conflict with the Administration's expansive view of the President's powers. The Administration cites for support to the judicial canon of constitutional avoidance.[10] Given the Bush Administration's propensity to claim that it is simply engaging in statutory interpretation when it in effect is claiming the authority to disregard a statute, Congress should amend the current notification requirement to extend beyond cases in which the executive branch acknowledges it is refusing to comply with a statute. Presidents should explain publicly not only when they determine a statute is

10. In its classic statement of the avoidance canon, the Supreme Court wrote, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress." Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

unconstitutional and need not be enforced, but also whenever they purport to rely upon the constitutional avoidance canon to interpret a statute.

Professors Trevor Morrison and H. Jefferson Powell in separate articles recently have explored the extent to which it even is appropriate for the executive branch to rely upon the avoidance canon in determining how to enforce a statute.[11] When invoked by the courts, the avoidance canon is a doctrine of judicial restraint, one that minimizes judicial invalidation of statutes. When invoked by the President to interpret at statute to avoid a conflict with his view of his own powers, it brings substantial risks of abuse to expand presidential power. As Professor Morrison has recently explained, the most persuasive justification for allowing the executive branch even to use the avoidance canon, notwithstanding the substantial risks of abuse, is to promote constitutional enforcement by requiring Congress to be clear about its intent when it comes close to a constitutional line. Executive use of the avoidance canon, like judicial use, protects constitutional norms by encouraging Congress to deliberate before coming close to violating them. This justification, which has the effect of forcing Congress to reconsider legislation, depends entirely on the executive branch disclosing its concerns to Congress.

The Bush Administration, however, repeatedly has relied upon the avoidance doctrine in secret, depriving Congress of any opportunity to respond with clarifying legislation. Congress cannot effectively legislate unless it knows how the executive branch is implementing existing laws. Moreover, if the President refuses even to notify Congress when he refuses to comply with a statutory requirement, Congress—and the public—has little ability to monitor the executive branch's legal compliance and significant reason for suspicion. The public notification regarding either nonenforcement or the use of the avoidance canon should contain sufficient detail and analysis genuinely to inform the public of the legal reasoning behind the administration's legal conclusions, as well as of its potential future action.

Our system does not work when the executive branch secretly determines not to follow enacted statutes—or interprets them away under extreme constitutional theories. This is not to deny the executive branch its constitutional authority. It is to assure that in our constitutional democracy, where the rule of law is paramount, all branches of government and the American people know what the law is.

11. *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006); Trevor W. Morrison, *Executive Branch Avoidance and the Need for Congressional Notification*, SIDEBAR: ONLINE PUBL. COLUM. L. REV., http://clrsidebar.org/essays/executive-branch-avoidance (last visited April 28, 2008); H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2006).

Principles to Guide the Office of Legal Counsel
December 21, 2004

The Office of Legal Counsel (OLC) is the Department of Justice component to which the Attorney General has delegated the function of providing legal advice to guide the actions of the President and the agencies of the executive branch. OLC's legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President. From the outset of our constitutional system, Presidents have recognized that compliance with their constitutional obligation to act lawfully requires a reliable source of legal advice. In 1793, Secretary of State Thomas Jefferson, writing on behalf of President Washington, requested the Supreme Court's advice regarding the United States' treaty obligations with regard to the war between Great Britain and France. The Supreme Court declined the request, in important measure on the grounds that the Constitution vests responsibility for such legal determinations within the executive branch itself: "[T]he three departments of government ... being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions seems to have been purposely as well as expressly united to the executive departments." Letter from John Jay to George Washington, August 8, 1793, *quoted in* 4 The Founders' Constitution 258 (Philip B. Kurland & Ralph Lerner, eds. 1987).

From the Washington Administration through the present, Attorneys General, and in recent decades the Office of Legal Counsel, have served as the source of legal determinations regarding the executive's legal obligations and authorities. The resulting body of law, much of which is published in volumes entitled Opinions of the Attorney General and Opinions of the Office of Legal Counsel, offers powerful testimony to the importance of the rule-of-law values that President Washington sought to secure and to the Department of Justice's profound tradition of respect for the rule of law. Administrations of both political parties have maintained this tradition, which reflects a dedication to the rule of law that is as significant and as important to the country as that shown by our courts. As a practical matter, the responsibility for preserving this tradition cannot rest with OLC alone. It is incumbent upon the Attorney General and the President to ensure that OLC's advice is sought on important and close legal questions and that the advice given reflects the best executive branch traditions. The principles set forth in this document are based in large part on the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations.

1. When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.

OLC's core function is to help the President fulfill his constitutional duty to uphold the Constitution and "take care that the laws be faithfully executed" in all of the varied work of the executive branch. OLC provides the legal expertise necessary to ensure the lawfulness of presidential and executive branch action, including contemplated action that raises close and difficult questions of law. To fulfill this function appropriately, OLC must provide advice based on its best understanding of what the law requires. OLC should not simply provide an advocate's best defense of contemplated action that OLC actually believes is best viewed as unlawful. To do so would deprive the President and other executive branch decisionmakers of critical information and, worse, mislead them regarding the legality of contemplated action. OLC's tradition of principled legal analysis and adherence to the rule of law thus is constitutionally grounded and also best serves the interests of both the public and the presidency, even though OLC at times will determine that the law precludes an action that a President strongly desires to take.

2. *OLC's advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of the coordinate branches of the federal government–the courts and Congress–and constitutional limits on the exercise of governmental power.*

The President is constitutionally obligated to "preserve, protect and defend" the Constitution in its entirety–not only executive power, but also judicial and congressional power and constitutional limits on governmental power–and to enforce federal statutes enacted in accordance with the Constitution. OLC's advice should reflect all relevant legal constraints. In addition, regardless of OLC's ultimate legal conclusions concerning whether proposed executive branch action lawfully may proceed, OLC's analysis should disclose, and candidly and fairly address, the relevant range of legal sources and substantial arguments on all sides of the question.

3. OLC's obligation to counsel compliance with the law, and the insufficiency of the advocacy model, pertain with special force in circumstances where OLC's advice is unlikely to be subject to review by the courts.

In formulating its best view of what the law requires, OLC always should be mindful that the President's legal obligations are not limited to those that are judicially enforceable. In some circumstances, OLC's advice will guide executive branch action that the courts are unlikely to review (for example, action unlikely to result in a justiciable case or controversy) or that the courts likely will review only under a standard of extreme deference (for example, some questions regarding war powers and national security). OLC's advice should reflect its best view of all applicable legal constraints, and not only legal constraints likely to lead to judicial invalidation of executive branch action. An OLC approach that instead would equate "lawful" with "likely to escape judicial condemnation" would ill serve the President's constitutional duty by failing to

describe all legal constraints and by appearing to condone unlawful action as long as the President could, in a sense, get away with it. Indeed, the absence of a litigation threat signals special need for vigilance: In circumstances in which judicial oversight of executive branch action is unlikely, the President–and by extension OLC–has a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.

4. OLC's legal analyses, and its processes for reaching legal determinations, should not simply mirror those of the federal courts, but also should reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office.

As discussed under principle 3, jurisdictional and prudential limitations do not constrain OLC as they do courts, and thus in some instances OLC appropriately identifies legal limits on executive branch action that a court would not require. Beyond this, OLC's work should reflect the fact that OLC is located in the executive branch and serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the executive power. What follows from this is addressed as well under principle 5. The most substantial effects include the following: OLC typically adheres to judicial precedent, but that precedent sometimes leaves room for executive interpretive influences, because doctrine at times genuinely is open to more than one interpretation and at times contemplates an executive branch interpretive role. Similarly, OLC routinely, and appropriately, considers sources and understandings of law and fact that the courts often ignore, such as previous Attorney General and OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch. Finally, OLC differs from a court in that its responsibilities include facilitating the work of the executive branch and the objectives of the President, consistent with the requirements of the law. OLC therefore, where possible and appropriate, should recommend lawful alternatives to legally impermissible executive branch proposals. Notwithstanding these and other significant differences between the work of OLC and the courts, OLC's legal analyses always should be principled, thorough, forthright, and not merely instrumental to the President's policy preferences.

5. OLC advice should reflect due respect for the constitutional views of the courts and Congress (as well as the President). On the very rare occasion when the executive branch—usually on the advice of OLC—declines fully to follow a federal statutory requirement, it typically should publicly disclose its justification.

OLC's tradition of general adherence to judicial (especially Supreme Court) precedent and federal statutes reflects appropriate executive branch respect for the coordinate branches of the federal government. On very rare occasion, however, Presidents, often with the advice of OLC, appropriately act on their own understanding of constitutional meaning (just as Congress at times enacts laws based on its own constitutional views). To begin with relatively uncontroversial examples, Presidents at

times veto bills they believe are unconstitutional and pardon individuals for violating what Presidents believe are unconstitutional statutes, even when the Court would uphold the statute or the conviction against constitutional challenge. Far more controversial are rare cases in which Presidents decide to refuse to enforce or otherwise comply with laws they deem unconstitutional, either on their face or in some applications. The precise contours of presidential power in such contexts are the subject of some debate and beyond the scope of this document. The need for transparency regarding interbranch disagreements, however, should be beyond dispute. At a bare minimum, OLC advice should fully address applicable Supreme Court precedent, and, absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation. Absent transparency and clarity, client agencies might experience difficulty understanding and applying such legal advice, and the public and Congress would be unable adequately to assess the lawfulness of executive branch action. Indeed, federal law currently requires the Attorney General to notify Congress if the Department of Justice determines either that it will not enforce a provision of law on the grounds that it is unconstitutional or that it will not defend a provision of law against constitutional challenge.

6. OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.

OLC should follow a presumption in favor of timely publication of its written legal opinions. Such disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority. Transparency also promotes confidence in the lawfulness of governmental action. Making executive branch law available to the public also adds an important voice to the development of constitutional meaning–in the courts as well as among academics, other commentators, and the public more generally–and a particularly valuable perspective on legal issues regarding which the executive branch possesses relevant expertise. There nonetheless will exist some legal advice that properly should remain confidential, most notably, some advice regarding classified and some other national security matters. OLC should consider the views regarding disclosure of the client agency that requested the advice. Ordinarily, OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action. For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formation. In all events, OLC should in each administration consider the circumstances in which advice should be kept confidential, with a presumption in favor of publication, and publication policy and practice should not vary substantially from administration to administration. The values of transparency and accountability remain constant, as do any existing legitimate rationales for secret executive branch law. Finally, as discussed in principle 5, Presidents, and by extension OLC, bear a special responsibility to disclose publicly and explain any actions that conflict with federal statutory requirements.

7. OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible view of the law.

OLC systems and processes can help maintain high legal standards, avoid errors, and safeguard against tendencies toward potentially excessive claims of executive authority. At the outset, OLC should be careful about the form of requests for advice. Whenever possible, agency requests should be in writing, should include the requesting agency's own best legal views as well as any relevant materials and information, and should be as specific as circumstances allow. Where OLC determines that advice of a more generally applicable nature would be helpful and appropriate, it should take special care to consider the implications for its advice in all foreseeable potential applications. Also, OLC typically should provide legal advice in advance of executive branch action, and not regarding executive branch action that already has occurred; legal "advice" after the fact is subject to strong pressures to follow an advocacy model, which is an appropriate activity for some components of the Department of Justice but not usually for OLC (though this tension may be unavoidable in some cases involving continuing or potentially recurring executive branch action). OLC should recruit and retain attorneys of the highest integrity and abilities. OLC should afford due respect for the precedential value of OLC opinions from administrations of both parties; although OLC's current best view of the law sometimes will require repudiation of OLC precedent, OLC should never disregard precedent without careful consideration and detailed explanation. Ordinarily OLC legal advice should be subject to multiple layers of scrutiny and approval; one such mechanism used effectively at times is a "two deputy rule" that requires at least two supervising deputies to review and clear all OLC advice. Finally, OLC can help promote public confidence and understanding by publicly announcing its general operating policies and procedures.

8. Whenever time and circumstances permit, OLC should seek the views of all affected agencies and components of the Department of Justice before rendering final advice.

The involvement of affected entities serves as an additional check against erroneous reasoning by ensuring that all views and relevant information are considered. Administrative coordination allows OLC to avail itself of the substantive expertise of the various components of the executive branch and to avoid overlooking potentially important consequences before rendering advice. It helps to ensure that legal pronouncements will have no broader effect than necessary to resolve the question at hand. Finally, it allows OLC to respond to all serious arguments and thus avoid the need for reconsideration.

9. *OLC should strive to maintain good working relationships with its client agencies, and especially the White House Counsel's Office, to help ensure that OLC is consulted,*

before the fact, regarding any and all substantial executive branch action of questionable legality.

Although OLC's legal determinations should not seek simply to legitimate the policy preferences of the administration of which it is a part, OLC must take account of the administration's goals and assist their accomplishment within the law. To operate effectively, OLC must be attentive to the need for prompt, responsive legal advice that is not unnecessarily obstructionist. Thus, when OLC concludes that an administration proposal is impermissible, it is appropriate for OLC to go on to suggest modifications that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives. Executive branch officials nonetheless may be tempted to avoid bringing to OLC's attention strongly desired policies of questionable legality. Structures, routines and expectations should ensure that OLC is consulted on all major executive branch initiatives and activities that raise significant legal questions. Public attention to when and how OLC generally functions within a particular administration also can help ensure appropriate OLC involvement.

10. OLC should be clear whenever it intends its advice to fall outside of OLC's typical role as the source of legal determinations that are binding within the executive branch.

OLC sometimes provides legal advice that is not intended to inform the formulation of executive branch policy or action, and in some such circumstances an advocacy model may be appropriate. One common example: OLC sometimes assists the Solicitor General and the litigating components of the Department of Justice in developing arguments for presentation to a court, including in the defense of congressional statutes. The Department of Justice typically follows a practice of defending an act of Congress against constitutional challenge as long as a reasonable argument can be made in its defense (even if that argument is not the best view of the law). In this context, OLC appropriately may employ advocacy-based modes of analysis. OLC should ensure, however, that all involved understand whenever OLC is acting outside of its typical stance, and that its views in such cases should not be taken as authoritative, binding advice as to the executive branch's legal obligations. Client agencies expect OLC to provide its best view of applicable legal constraints and if OLC acts otherwise without adequate warning, it risks prompting unlawful executive branch action.

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